Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling on Issues	)	
Contained in the Access Charge Litigation	)	
Sprint PCS v. AT&T	)	
	)	
	)	WT Docket No. 01-316
AT&T CORP.	)	
Petitioner,	)	
	)	
v.	)	
	)	
SPRINT SPECTRUM, d/b/a Sprint PCS	)	
Respondent	)	

To: The Commission

COMMENTS OF SALMON PCS LLC

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Summary of Salmon PCS comments

Salmon PCS LLC ("Salmon") is filing comments in this proceeding in support of the Sprint PCS Petition for Declaratory Ruling and in opposition to the AT&T Petition for Declaratory Ruling.

Salmon submits that: (a) commercial mobile radio service (CMRS) carriers are entitled as a matter of law to assess access charges; (b) a bill and keep intercarrier compensation regime for CMRS access traffic is inappropriate at this time; and, (c) the Commission should allow CMRS carriers the same flexibility in setting access charge rates as is accorded to non-dominant, non-incumbent local exchange carriers.

The Salmon position is based in large part on the need for competitive parity and technological neutrality. The favorable trend, in which wireless services are increasingly becoming substitutes for traditional landline services, will only continue if wireless carriers can be compensated for providing terminating access service as other telecommunications carriers are compensated.

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To: The Commission

COMMENTS OF SALMON PCS LLC

Salmon PCS LLC ("Salmon"), by its attorneys and pursuant to the Commission's November 8, 2001 Public Notice,[1] hereby provides its comments in the captioned proceeding in support of the Sprint PCS Petition for Declaratory Ruling[2] ("*Sprint Petition*") and in opposition to the AT&T Petition for Declaratory Ruling[3] ("*AT&T Petition*"). The *Sprint Petition* seeks a declaratory ruling from the Commission that (a) the Communications Act of 1934, as amended (the "Act"), and the Commission's Rules do not prohibit Sprint PCS from recovering from AT&T the costs of terminating AT&T's interexchange traffic over Sprint PCS' commercial

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1 *Public Notice*, Sprint PCS and AT&T File Petition for Declaratory Ruling on CMRS Access Charge Issues, WT Docket 01-316, DA 01-2618 (Rel. Nov. 8, 2001)("Notice").

2 Sprint Spectrum d/b/a Sprint PCS, *Petition for Declaratory Ruling*, filed October 22, 2001.

3 AT&T Corp., *Petition for Declaratory Ruling*, filed October 22, 2001.

mobile radio service ("CMRS") network; (b) AT&T's refusal to compensate Sprint PCS for the costs associated with AT&T's interexchange traffic is an unjust and unreasonable practice in contravention of Section 201(b) of the Act; and (c) AT&T's refusal to compensate Sprint PCS for its exchange access services violates Section 202(a) of the Act. The *AT&T Petition*, on the other hand, requests that the Commission issue a declaratory ruling that (a) access charge payments by interexchange carriers ("IXCs") to CMRS carriers are unwarranted and that an alleged long-standing industry bill and keep compensation mechanism should remain intact; and (b) if CMRS carriers are entitled to assess access charges, the appropriate rate should be the total element long-run incremental cost ("TELRIC") charged by the CMRS carrier for the termination of intraMTA traffic.

As explained in greater detail below, Salmon submits that (a) CMRS carriers are entitled as a matter of law and past Commission precedent to assess access charges; (b) a bill and keep intercarrier compensation regime for CMRS access traffic is inappropriate at this time; and, (c) the Commission should allow CMRS carriers the same access charge flexibility accorded other non-incumbent local exchange carriers. The following is respectfully shown:

I. INTRODUCTION

Salmon is a limited liability company consisting of two members: Crowley Digital Wireless, LLC ("Crowley Digital") and Cingular Wireless LLC ("Cingular"). Salmon is controlled by Crowley Digital which in turn is controlled by long-time telecommunications entrepreneur George D. Crowley, Jr. Cingular was formed by the combination of the U.S. wireless telecommunications operations of SBC Communications Inc. and BellSouth Corporation, two of the largest U.S. providers of voice and data services. Cingular has over 19 million wireless subscribers in over 260 U.S. markets.

Salmon participated in FCC Auction No. 35, and submitted winning bids on 79 licenses in 77 Basic Trading Areas ("BTAs"), including Los Angeles, Dallas, Boston, Washington DC, Houston, Atlanta, Minneapolis, Pittsburgh, Baltimore, Tampa, Denver, Portland, Norfolk,

Providence, Louisville, Orlando and Richmond, each of which contains over one million POPS. Salmon already has been found to be qualified as a Very Small Business under the FCC's Rules, and has been granted 45 of the licenses on which it submitted winning bids in Auction No. 35.

As a major new entrant to the wireless market across the country, Salmon has a substantial interest in assuring that it is able to compete on a level playing field with other telecommunications carriers. And, as wireless services increasingly become substitutes for other traditional exchange and interexchange services, it is essential that all carriers receive equivalent compensation for providing terminations services regardless of whether the call delivery mechanism happens to be wired or wireless. As is set forth in greater detail below, applying this principle of competitive parity requires that wireless carriers be allowed to assess and collect wireless access charges.

II. CMRS CARRIERS ARE ENTITLED AS A MATTER OF LAW TO ASSESS ACCESS CHARGES

A. Prior Commission Precedent Permits Wireless Carriers To Assess Access Charges on all Interexchange Telecommunications Traffic that Terminates on their Network

Section 69.5 of the Commission's rules provides that access charges are assessed upon "all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services . . . ."[4] As Sprint PCS correctly observes, CMRS carriers provide exchange access as defined in the Act, and AT&T does not dispute this fact.[5] Notably, the Commission has concluded that CMRS carriers provide telephone exchange service.[6] The fact that CMRS providers provide telephone exchange service means they also

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[4] Local exchange switching facilities are not defined in the Act. However, as discussed *infra*, the Commission has concluded that CMRS carriers provide telephone exchange services and that CMRS carriers are entitled to assess interstate access charges. Accordingly, it is reasonable to conclude that the switching functions performed by CMRS carriers qualify as "local exchange switching facilities".

[5] Section 3(16) of the Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."

[6] *First Report and Order, Implementation of the Local Competition Provisions in the*

provide exchange access because CMRS providers are providing "access" to their telephone exchange services.

This is not a new conclusion. In 1987, the Commission held that cellular carriers were entitled to collect their switching costs from other telecommunications carriers, including interexchange carriers, when they provided access to their network.[7] In 1989, the Commission reaffirmed this decision and reiterated that "our Ruling [in the *CMRS Interconnection Order*] correctly held that cellular carriers and telephone companies are equally entitled to just and reasonable compensation for their provision of interstate access, whether through tariff or by a division of revenues."[8]

Then, in 1993, Congress enacted the Omnibus Budget Reconciliation Act of 1993 which implicitly recognized that CMRS providers were providing access services.[9] In response to CMRS industry concerns regarding the appropriateness of obligating CMRS carriers to abide by equal access requirements for interexchange services, Congress concluded that "[a] person

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Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 FCC Rcd 15499, at ¶ 1013 (1996)*(*"*Local Competition Order*"). The Commission concluded that at a minimum cellular, broadband PCS, and covered SMR providers provide telephone exchange service.

[7] Declaratory Ruling, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 2 FCC Rcd 2910, 2915; 1987 FCC LEXIS 3885; 63 Rad. Reg. 2d (P & F) 7 (Rel. May 18, 1987) ("We believe that under the reasonable interconnection standard, interstate switching charges, like the interstate charges for physical interconnection and the opening of NXX codes, should be cost based. A cost based system of compensation will allow telephone companies to recover their costs of switching interconnected interstate traffic. The same policy will apply to cellular carriers. … Cellular carriers and telephone companies are equally entitled to just and reasonable compensation for their provision of access, whether through tariff or by a division of revenues agreement.") ("*CMRS Interconnection Order*").

[8] *Memorandum Opinion and Order on Reconsideration, In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services* (*Cellular Interconnection Proceeding*), 4 FCC Rcd 2369, 2373 ¶ 26; 1989 FCC LEXIS 540; 66 Rad. Reg. 2d (P & F) 105 ("*CMRS Interconnection Reconsideration Order*").

[9] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) ("*Omnibus Act*").

engaged in the provision of commercial mobile services … shall not be required to provide equal access to common carriers for the provision of telephone toll services." This exemption would not have been required were it not the case that CMRS carriers were providing access services. Indeed, at the time of passage of the *Omnibus Act*, many CMRS carriers had on file with the Commission interstate tariffs for the provision of their interstate services, including equal access, and this provision eliminated the CMRS carrier's need to provide equal access.[10]

The *Omnibus Act* also provided the Commission with additional flexibility to forbear from requirements of the Act, including, *inter alia*, tariffing requirements which had been re-imposed on CMRS carriers as a result of a D.C. Circuit decision.[11] In the *Second Report and Order* implementing the *Omnibus Act*, the Commission decided to "temporarily forbear from requiring or permitting CMRS providers to file tariffs for interstate access service."[12] The Commission codified this conclusion in Section 20.15(c) of the Commission's Rules which provides that "[c]ommercial mobile radio service providers shall not file tariffs for interstate service to their customers, interstate access service, or interstate operator service."[13] Obviously, if CMRS carriers were not already permitted to assess access charges, the Commission would not have needed to forbear from requiring or permitting access tariffs.

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10 *Second Report and Order*, *In the Matter of Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411, ¶ 10 (March 7, 1994) ("*Second R&O on Omnibus Act*") ("As a result of this decision [*AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993, *cert. denied*, S. Ct. Docket No. 92-1684, 1993 Lexis 4392, 113 S. Ct. 3020, 61 U.S.L.W. 3853 (June 21, 1993)], mobile common carriers began to file new tariffs for their interstate services.").

11 *See* 47 USC 332(c)(1)(A) provides in pertinent part that "A person engaged in the provision of a service that is a commercial mobile service shall … be treated as common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person.". *See also AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993, *cert. denied*, S. Ct. Docket No. 92-1684, 1993 Lexis 4392, 113 S. Ct. 3020, 61 U.S.L.W. 3853 (June 21, 1993).

12 *Second R&O on Omnibus Act* at ¶ 178.

13 47 C.F.R. § 20.15(c).

The Commissioner further reinforced the conclusion that wireless carriers provide compensable access services when, in implementing section 332(c)(8) of the *Omnibus Act*, the Commission found that "[i]t should be noted that in the [*CMRS Interconnection Order*], the Commission stated that cellular carriers are entitled to just and reasonable compensation for their provision of access."[14] This was reiterated when the Commission tentatively concluded, in a *Notice of Proposed Rulemaking* issued in 1995, that "CMRS providers should be entitled to recover access charges from IXCs, as the LECs do when interstate interexchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks."[15] This particular proceeding was never concluded because the Commission's consideration of LEC/CMRS interconnection issues was overtaken by the passage of the Telecommunications Act of 1996.[16] However, the Commission never has rescinded the tentative conclusion that wireless carriers are entitled to collect access. Indeed, in its historic *Local Competition Order* implementing the 1996 Act, the Commission found nothing in the 1996 Act that required modification of its existing access charge regime.

Accordingly, a proper view of the applicable precedent compels the conclusion that access charges are appropriate for the exchange access services performed by CMRS carriers. Compelling evidence of this conclusion is provided by the fact that most major IXCs that received bills for access from Sprint paid the bills; AT&T is the only major IXC to object.[17]

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14 *Notice of Proposed Rulemaking and Notice of Inquiry, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, 9 FCC Rcd 5408, 5447 ¶ 83 (Rel. Jul. 1, 1994)("*CMRS Equal Access/Interconnection*") citing the *CMRS Interconnection Order*.

15 *Notice of Proposed Rulemaking, In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, 11 FCC Rcd, 5020 (Docket 95-185)(Adopted December 15, 1995)("*CMRS NPRM*") at ¶ 116. AT&T tries to argue that the statements in the *CMRS NPRM* show that the issue of whether CMRS carriers are entitled to assess access charges is unsettled. However, the Commission expressly recognized in the *CMRS NPRM* that it had previously decided that CMRS carriers could not tariff access charges.

16 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.(the "1996 Act").

17 Sprint Petition at p. 5.

In seeking to deny wireless carriers their right to access charges, AT&T seeks comfort in the fact that the Commission recently sought comment in its *Unified Intercarrier Compensation Regime* proceeding[18] on whether CMRS carriers are entitled to assess access charges. AT&T reads too much into this inquiry. The *Unified Intercarrier Compensation NPRM* contains no detailed discussion of wireless access, and thus should not be viewed as a definitive legal analysis of the status of the entitlement. Properly viewed, since the *Unified Intercarrier Compensation NPRM* is undertaking a comprehensive review of many long-settled compensation arrangements, the mere fact that comment is sought on wireless access should not be construed as an indication that no pre-existing entitlement to wireless access exists.

In sum, contrary to AT&T's claims, in ruling on the declaratory ruling requests, the Commission should find that it has a long-standing policy that CMRS carriers are entitled to assess access charges. The Commission should reject the declaratory rulings sought by AT&T and affirm that CMRS providers are entitled to bill access as a matter of law and prior Commission precedent.

B. AT&T Mischaracterizes The Reasons More CMRS Carriers Have Not Previously Charged for Access

The *AT&T Petition* claims that CMRS carriers do not assess access charges because CMRS and interexchange carriers ("IXCs") had a long-standing understanding which "spontaneously arose" of not charging for access services and that CMRS providers were "content to recover their costs through the ample "air time" charges they assess on their end users."[19] AT&T provides no evidence in support of this claim; in fact it is untrue.

CMRS carriers never "agreed" to a bill-and-keep arrangement for wireless access. Rather, they chose to forgo access payments for a time because CMRS carriers did not have the level of traffic to justify placing the mechanisms in place to effectively measure and bill

[18] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610, ¶94 (2001) (*Intercarrier Compensation NPRM*).

[19] *AT&T Petition* at pp. 2 and 12.

interexchange access traffic. Prior to the passage of the 1996 Act, CMRS carriers generally were obligated to pay the incumbent local exchange carrier ("ILEC") for all calls that originated and terminated on the CMRS network. Moreover, CMRS carriers generally did not receive mutual compensation for the termination functions performed by them.[20] Since CMRS carriers were not able to collect mutual compensation from the ILECs, CMRS carriers did not implement systems to collect the necessary information to measure and bill for the non-existent mutual compensation. Furthermore, until fairly recently, the amount of land-to-mobile traffic was relatively small (e.g., many of the first interconnection agreements entered into by the CMRS carriers under the 1996 Act provided for traffic factors in the neighborhood of 80/20).[21] Since IXC traffic represented only a small fraction of the 20% of the traffic that was land-to-mobile, it was not cost effective to design and implement access billing systems.[22]

Moreover, prior to 1996, many CMRS networks were not interconnected at the ILEC tandem nor did they utilize Signaling System 7 (SS7). Consequently, CMRS carriers in many instances did not receive any identifying information on the traffic they received from the ILEC and could not distinguish between IXC traffic and other traffic. Additionally, many of the pre-1996 Act interconnection agreements did not require the ILEC to provide CMRS carriers with the necessary information to bill access traffic to the IXC and, in some instances, there was confusion about whether the ILECs were receiving compensation for access traffic terminated on CMRS networks. All of these factors combined to discourage wireless carriers from seeking to collect access even though they were parties to no "agreement" precluding them from doing so.

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[20] *See generally Local Competition Order* at ¶¶ 1080-1084.

[21] As AT&T properly points out, most of the traffic for which access is appropriate is either 8YY traffic originated by CMRS end-users or interexchange traffic terminated on CMRS networks because many CMRS carriers currently provide interexchange services for interexchange calls originated by their end-users.

[22] Indeed, the Commission in the *CMRS NPRM* recognized in many instances that access traffic levels were not sufficient to even justify direct trunking arrangements. *CMRS NPRM* at 5075 ¶ 115.

The current situation is quite different. The amount of land-to-mobile traffic has been increasing steadily and now in some instances is roughly balanced.[23] Accordingly, the amount of interexchange traffic being terminated by IXCs onto CMRS providers has been growing steadily and now is significant enough to warrant a charge by Sprint of over $60 million for 36 months.[24] Furthermore, many of the post-1996 Act interconnection agreements require ILECs to supply CMRS carriers with the necessary information in Multiple Exchange Carrier Access Billing ("MECAB") format to bill jointly provided access. Moreover, a growing number of CMRS carriers have implemented tandem level interconnection, SS7, and billing systems which allow them to record and bill both telecommunications and interexchange traffic.[25]

In sum, the prior reasons that CMRS carriers did not bill for access traffic are no longer applicable which explains why CMRS carriers other than Sprint are commencing to assess assessing access charges to IXCs for the termination of traffic.[26] The Commission should reject the unsupported AT&T claim that there is in place either an agreement or a binding industry practice that precludes wireless access.

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[23] *See, e.g.*, Comments of AT&T Wireless in Unified Intercarrier Compensation Regime NPRM at p. 14.

[24] Sprint Petition at p. 4.

[25] In the *Local Competition Order*, the Commission originally used the term "local telecommunications traffic" to distinguish between traffic subject to access and traffic subject to Section 251(b)(5) mutual compensation obligations. In the *Order on Remand and Report and Order* in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, FCC 01-131 (Rel. April 27, 2001) ("*ISP Remand Order*") the Commission eliminated the use of the word "local", but still distinguished between CMRS traffic that originated and terminates in the same MTA and interexchange traffic.

[26] *Sprint Petition* at p. 5. Sprint states that Western Wireless is currently charging access and Verizon Wireless "is in the process of issuing such invoices."

III. A BILL AND KEEP INTERCARRER COMPENSATION REGIME FOR CMRS ACCESS TRAFFIC IS INAPPROPRIATE AT THIS TIME

A. AT&T' s Arguments in Support of Bill and Keep are Unsound

AT&T argues that bill and keep is appropriate for CMRS traffic because CMRS carriers recover their costs from their end users for access traffic. The Commission must reject AT&T's argument for several reasons. First, the mere fact that CMRS carriers charge their end-users for all calls is irrelevant to whether IXCs are obligated to pay for the access services they receive. In fact, the Commission already has rejected this argument. In the *CMRS Interconnection Reconsideration Order*, the Commission concluded that

> [W]e reject NYNEX's argument that mutual compensation for [interstate] switching is in appropriate because the cellular operator may be recovering its costs from its subscribers. Rather, we agree with the cellular oppositions that a cellular carrier's subscriber rates, or the costs recovered, are not germane to the issue of mutual compensation arrangements between co-carriers.[27]

Similarly, in the *Local Competition Order*, the Commission expressly found that CMRS carriers were entitled to be paid terminating compensation even though they were charging their end-user customer for terminating traffic.[28]

Second, AT&T's argument is logically flawed. Under AT&T's reasoning, any carrier whose rates are not directly regulated by the Commission would not be entitled to be paid for the services it renders. For example, since payphone providers can charge calling parties for the use of payphones, under AT&T's logic payphone providers should not be entitled to be paid for 800 calls placed from pay phones. However, this is not the case.[29] The truth is that taking this AT&T argument to its logical extreme would completely disrupt well-settled compensation schemes.

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27 *CMRS Interconnection Reconsideration Order* at 2373 ¶ 27.

28 *Local Competition Order* at ¶ 1041.

29 *See, e.g., Report and Order, Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, 11 FCC Rcd 20541 (1996).

Third, even if AT&T's argument about recovery of costs by CMRS carriers was relevant, it does not follow that AT&T is entitled to access CMRS networks for free. Under the calling party's network pays ("CPNP") scheme currently applied to most intercarrier compensation, the IXC is responsible for the payment of access regardless of whether the exchange access provider recovers costs from its subscribers. For example, under the Commission's current Rules applicable to exchange access provided by local exchange carriers, the LEC recovers some of its costs from its end-user through subscriber line charges (SLC), but also recovers its costs from the IXC. If the Commission finds it relevant that CMRS carriers charge their own end-user customers for some portion of the access services they provide, the Commission should view the CMRS end-user charges in the same manner as its does with respect to ILEC access recovery – the CMRS charges would represent the SLC with the IXC still being responsible for access. Moreover, the mere fact that CMRS carriers may charge their customer does not allow AT&T to receive access for free because, as Sprint observes in its Petition, such an outcome would result in AT&T obtaining a windfall.[30]

B. Bill and Keep For Wireless Access Would Be Discriminatory and Anticompetitive

Mandatory bill and keep for wireless access services would be discriminatory, anticompetitive, and violate the Commission's long-standing policy of technological and competitive neutrality. CMRS carriers are becoming increasingly competitive with wireline carriers[31] and thus, to protect the public interest in a freely competitive market, any differences in intercarrier compensation between CMRS and wireline telecommunications carriers must be competitively neutral. For example, Leap Wireless, among others, has indicated that it is directly

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30 *Sprint Petition* at p. 10.

31 *See* Shawn Young, "More Callers Cut Off Second Phone Lines for Cellphone, Cable Modems," Wall Street Journal, November 15, 2001, at B1; S*ee also* Digital Broadbank Migration – Part II, FCC Chairman Michael K. Powell, Speech at FCC Press Conference (Oct. 23, 2001) (As Chairman Powell recently noted, alternative, facilities-based platforms, such as wireless networks, offer "real competitive choices" and represent "the best hope for competition for residential consumers.")

competing with wireline services.[32] Indeed, Salmon understands that is a there is a growing number of wireline customers who are "cutting the cord" and using CMRS services as their primary telecommunications service. In addition, the Commission recently found that CMRS carriers can be eligible telecommunications carriers (ETC) and receive universal service funds.[33] Given the fact that CMRS services now compete both with other CMRS services and wireline telephone services, CMRS carriers rates will increasingly become driven by wireline rates. Since wireline rates are set with the benefit of access payments, CMRS carriers must also be assured of receiving similar access payments if they are to compete effectively with wireline services.

Second, if the Commission concludes that CMRS carriers are unable to assess access charges like their wireline competitors, CMRS services will be stymied. This is exactly the conclusion reached earlier by the Commission. In 1996, the Commission tentatively concluded in the *CMRS NPRM* that "any less favorable treatment of CMRS providers [e.g., to not be able to assess access charges]would be unreasonably discriminatory, and would interfere with our statutory objective and ongoing commitment to foster the development of new wireless services such as CMRS."[34]

Third, the Commission consistently has promulgated policies that promote technological and competitive neutrality.[35] These goals would be frustrated completely by any adoption of bill and keep for CMRS access traffic unless and until all access services provided by all telecommunications carriers is treated as bill and keep.[36] The only way to ensure technological

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32 *See* Leap Wireless International, Inc., *Petition for Partial Waiver of E-911 Phase II Implementation Milestones,* CC Docket No. 94-102, filed Aug. 23, 2001, at p. 4.

33 *Memorandum Opinion and Order, Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier In the State of Wyoming,* CC Docket No. 96-45, DA 00-2896 (Rel. Dec. 26, 2000)

34 *CMRS NPRM* at 5075.

35 *See, e.g., Report and Order, Federal-State Joint Board on Universal Service,* 12 FCC Rcd 8776, 8801-06 (1997).

36 Salmon does not oppose the adoption of bill and keep for "local" telecommunications

neutrality is to continue to permit CMRS carriers to assess access charges at the same rates as other telecommunications carriers for as long as the Commission maintains access charges for other telecommunications carriers.[37] Since the access services provided by CMRS carriers are virtually identical to those provided by ILECs, there is no sound public policy reason to differentiate between wireline and CMRS access charges.

Accordingly, the Commission should reject mandatory bill and keep for CMRS access traffic because it would be discriminatory, anticompetitive and violate long-standing Commission policies of technological and competitive neutrality.

C. Access Charges Will Not Represent a "Windfall" for CMRS Providers

AT&T argues that payment of access charges to CMRS carriers will allow CMRS carriers to receive a "windfall" or engage in "double recovery".[38] This simply is not true. CMRS carriers receive intercarrier payments from the LECs for "local" telecommunications traffic originated by the LECs and terminated on the CMRS carrier's network. Since "local" telecommunications traffic represents the predominate traffic terminated by CMRS carriers rates generally have been set based on the costs of providing these services. Therefore, the Commission can reasonably conclude that CMRS rates do not generally reflect the costs of providing access. Access has not been widely taken into account in setting rates because it has historically been relatively inconsequential. And, perhaps most importantly, as the Commission previously concluded, the mere fact that CMRS carriers recover some of their costs from their

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traffic. In addition, Salmon does not oppose bill and keep for access traffic so long as the Commission creates a level playing field with all telecommunications carriers being subject to bill and keep for access.

[37] Salmon notes that the Commission in the *CLEC Access Order* concluded that CLECs would be entitled to receive access payments for the length of the CALLS Plan plus one year. *Seventh Report and Order and Further Notice of Proposed Rulemaking, Access Charge Reform; Reform of Access charges Imposed by Competitive Local exchange carriers, cc Docket No . 96-282, ("CLEC Access Order")FCC 01-196 (Rel. Apr. 27, 2001)* at ¶ 53.

[38] *AT&T Petition* at pp. 4 and 23

own end-users does not eliminate their entitlement to be paid for the services they render to other carriers.

In addition, the double recovery argument assumes a static pricing market in which allowing compensation for a new element of offered services (here, terminating wireless access) skews the compensation scheme. If this argument is accepted, virtually all compensation reform that is designed to create parity among competitors for providing comparable services would cease. Properly viewed, as observed by Sprint, it is AT&T that is seeking a windfall. AT&T currently enjoys "free" access to CMRS carriers networks, but charges its customers to terminate calls on CMRS networks. Accordingly, AT&T is enjoying a windfall by not paying CMRS carriers for access.

In the final analysis, the Commission must reject AT&T's argument that access charges represent a "windfall" or "double recovery" by CMRS carriers.

D. Permitting CMRS Carriers To Assess Access Charges Will Not Require Additional Regulation

AT&T argues that, since CMRS carriers will have the same bottleneck terminating access monopoly as other exchange access providers, allowing wireless access charges will require pervasive regulation.[39] Again, this is not true. The Commission already has examined the access market and concluded that pervasive regulation is not necessary. For example, in the context of CLEC access charges, the Commission concluded that CLECs were entitled to file and tariff and charge access rates up to the rate charged by the ILEC.[40] This is hardly "pervasive" regulation. Further, as described below, since the Commission has the plenary authority to establish both interstate and intrastate access rates, the continuation of CMRS access charges will not result in a multiplicity of state proceedings.

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39 *AT&T Petition* at pp. 17, 23-24.

40 *CLEC Access Order* at ¶ 40.

IV. THE COMMISSION SHOULD ALLOW CMRS CARRIERS THE SAME ACCESS CHARGE FLEXIBILITY ACCORDED NON-INCUMBENT LOCAL EXCHANGE CARRIERS

A. CMRS Provider's Rates for Access Do Not Need to be Regulated

Salmon disagrees with AT&T that the Commission needs to regulate the CMRS access market.[41] AT&T supports its view by pointing to the Commission's *CLEC Access Order* as evidence that access rates must be regulated.[42] There are, however, material differences between the CLEC access charge market and the CMRS access market. First, unlike the competitive local exchange market the CMRS market is intensely competitive and the vast majority of CMRS subscribers have wireline telephone service. For example, to the extent that CMRS carriers assess originating access for 8YY calls, customers will be incented to change carriers if the cost of such calls is higher for one CMRS carrier than another. Accordingly, the market will limit a CMRS carrier's ability to charge supra-competitive rates for access. Further, as CMRS services become increasing competitive with wireline services, wireline rates, which historically have been kept low, will act as a further deterrent to CMRS carrier's increasing rates.

Second, unlike CLEC services which are a complete substitute for ILEC services, in many instances calls placed to CMRS subscribers are paid for by the same person who is placing the call.[43] Accordingly, unlike CLEC customers, CMRS subscribers have an incentive to consider the access rates charged by the CMRS carrier. In addition, unlike CLECs , Salmon understands that the rates being charged by the CMRS carriers for access are not substantially different than the ILEC rate, and in many instances are the dominant ILEC rate for interstate

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41 *AT&T Petition* at p. 20.

42 *AT&T Petition* at pp. 21-24.

43 For example, in the instances of a business cellular user, the business is paying both for the CMRS service as well as the wireline service used to reach the CMRS subscriber. Accordingly, the ultimate decision-maker has an incentive to take into account all the costs associated with both services. If a CMRS carrier charges excessive access rates and the IXC passes those rates through, the decision-maker is less likely to subscribe to that CMRS service.

services and the NECA rate for intrastate rates. Accordingly, CMRS access rates do not represent a market failure necessitating regulatory intervention.

B. The Rates Set Forth in the *CLEC Access Order* Should be Presumptively Lawful for CMRS Providers

In the *CLEC Access Order*, the Commission established a safe harbor benchmark rate for CLECs access charges, and concluded that CLEC access rates at or below those rates would be presumptively lawful. As the Commission observed, by adopting a benchmark rate, the public interest is served by providing "critical stability for both the long distance and exchange access markets"[44] and the CLECs would enjoy "greater certainty, and a more reliable stream of revenue, because we conclude that CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established." [45] CLECs are required to negotiate directly with the IXC to reach contractual agreement before it can charge the IXC an access rate above the benchmark.[46] Taking this approach, the Commission concluded that forbearance from tariffing was warranted under Section 10 of the Act.[47] Furthermore, the Commission determined that CLECs are free to design their rates within the benchmark so long as the access charges do not exceed the benchmark in the aggregate.[48] Finally, the Commission "recognized the attraction of a tariffed regime" and concluded that CLECs could continue to file access tariffs so long as the rates remained with the benchmark.

Salmon submits that the Commission, for the same reasons it adopted a safe harbor for CLECs, should establish a similar safe harbor for CMRS access rates. As is evidenced by the

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44 *CLEC Access Order* at ¶ 44.

45 *CLEC Access Order* at ¶ 60.

46 *CLEC Access Order* at ¶ 40.

47 *CLEC Access Order* at ¶¶ 83-87.

48 *CLEC Access Order* at ¶ 55. In doing so, the Commission found that "CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark."

current referral which is the basis for the Petitions, it would serve the public interest to allow CMRS carriers to be able to enforce access charges without having to prove the reasonableness of the access rates being assessed. Furthermore, both IXCs and CMRS carriers will benefit because both will have greater certainty concerning the rates for access charges. Finally, the Commission will be able to avoid the need for repetitive and costly proceedings to determine the reasonableness of CMRS access rates whenever there is a dispute between the CMRS carriers and the IXC regarding access charges. This will serve the public interest by conserving scarce Commission resources.

The *CLEC Access Order* safe harbor rates also are an appropriate benchmark for CMRS access rates. Salmon believes that the costs of CMRS carriers to provide exchange access service are considerably higher than the benchmark rate. As the Commission observed previously, CMRS carriers are entitled to be paid for all the elements of their network which are cost sensitive without regard to the cost treatment of wireline functions.[49] As a result, the CLEC benchmark rate will incent CMRS providers to be efficient in their networks. Further, since rates will be effectively capped at the benchmark, CMRS carriers will be unable to exercise any market power. Finally, this rate will promote technological and competitive neutrality by ensuring that CLECs and CMRS carriers are treated similarly.

Salmon also urges the Commission to permit CMRS carriers to file access tariffs. As the Commission recognized in the *CLEC Access Order*, permissive tariffing serves the public interest. Indeed, proponents of the permissive tariffing adopted by the Commission in the *CLEC Access Order* posited that, without permissive tariffing, both CLECs and IXCs would incur substantial and unnecessary negotiation costs simply to exchange traffic which could marginally drive up rates for local and long distance services.[50] Salmon agrees that permissive tariffing

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[49] *See* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, and Dorothy T. Attwood, Chief, Common Carrier Bureau, to Mr. Charles McKee, dated May 9, 2001 ("*Sprint Letter*").

[50] *CLEC Access Order* at ¶ 35.

would yield the same benefits in the context of CMRS-IXC access charges because CMRS carriers and IXCs would not need to negotiate individual contracts to exchange traffic. Salmon, however, opposes mandatory tariffing of CMRS access charges because it would lead to increased and unnecessary regulatory costs. Accordingly, Salmon urges the Commission to adopt permissive tariffing for CMRS access charges. Finally, irrespective of whether a CMRS carriers files an access tariff, Salmon submits that CMRS carriers should still be entitled to enjoy the presumption of lawfulness so long as the rates charged are set at or below the safe harbor rate.

C. TELRIC is Inappropriate for CMRS Access Rates

AT&T argues that, if the Commission permits CMRS carriers to assess access charges, the rates assessed by CMRS carriers should be set at the same TELRIC rate charged by CMRS carriers for the termination of other "local" telecommunications traffic.[51] Salmon disagrees. First, the current TELRIC methodology used by the Commission for CMRS carriers is a mix of policy goals which are not necessarily related to the cost CMRS carriers incur to terminate access traffic. In the *Local Competition Order*, the Commission established that incumbent local exchange carriers were required to exchange traffic at TELRIC rates.[52] In examining competitive carrier networks, including CMRS networks, the Commission concluded that CMRS carriers were entitled to be paid the TELRIC costs charged by the ILEC as a default rate.[53] In the *Local Competition Order*, the Commission did not establish that CMRS carrier costs were the same as the ILEC, but rather that the TELRIC rates charged by the ILEC were a reasonable proxy for CMRS costs. The Commission, however, did not limit a CMRS carrier's ability to prove its actual costs and receive compensation in excess of the ILEC default rate. Indeed, the

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51 *AT&T Petition* at pp. 24-27.

52 *Local Competition Order* at ¶ 672.

53 *Local Competition Order* at ¶ 1085.

Commission recently has confirmed that CMRS carriers are entitled to higher terminating compensation to the extent that they can prove higher costs.[54]

As an extension of the symmetrical rule, when the Commission established the rate to be charged under 251(g) for ISP-bound traffic, the Commission required ILECs to offer the same rates to CMRS carriers.[55] Since CMRS carriers continue to be predominately net-originators of traffic, CMRS carriers are adopting these lower rates.[56] However, the ISP-bound traffic rates are not based on CMRS carrier costs, nor were CMRS carrier costs examined in the context of setting the ISP rate. In fact, the costs examined by the Commission were solely the costs of the ILEC and the CLECs.[57] Accordingly, it would be wholly inappropriate to set a CMRS carrier's access rates to rates established in proceedings in which CMRS costs were not even examined.

Second, the economic rationale behind using TELRIC for ILEC networks does not apply to CMRS networks. TELRIC was used in the context of ILECs who had historical networks which were not necessarily the most efficient and which were paid for by captive ratepayers. Furthermore, TELRIC rates were established to foster competition in the local telecommunications market by allowing competing carriers to enjoy the same economies of scale and scope that the ILEC enjoyed in providing telecommunications services.

None of these rationales apply to CMRS-IXC access rates. First, CMRS carriers do not have the same dominant market position as the ILECs and thus CMRS carriers have had to constantly upgrade their networks constantly to maintain efficiency. Second, the provision of access is substantially different than the provision of interconnection or unbundled network elements to which TELRIC has been previously applied. In the instance of both interconnection and unbundled network elements, the services are required to enable competition to develop and

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54 Sprint Letter.

55 *ISP Remand Order* at ¶ 89.

56 Indeed, the Commission itself recognized this naturally result of the "mirroring rule". *ISP Remand Order* at fn. 176.

57 *ISP Remand Order* at ¶ 85.

to allow new entrants to compete with the incumbents. TELRIC rates for access services, however, are not necessary for IXCs to compete in the IXC marketplace. Accordingly, the economic rationale behind using TELRIC or forward-looking costs does not apply in the context of CMRS-IXC access.

D. The Commission has the Plenary Authority to set CMRS Interstate and Intrastate Access Rates and the Commission should Establish a Federal Access Regime for all CMRS Access

The Commission has plenary authority to set both interstate and intrastate access rates for CMRS carriers pursuant to Sections 201 and 332 of the Act. In adopting Section 332, Congress made clear that its goal was to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure".[58] Congress believed that such a regime would naturally be federal in nature and Congress accordingly precluded states from regulating the entry or rates of CMRS carriers. In the *Local Competition Order*, the Commission recognized that 332(c)(1)(B) provides it with additional authority over CMRS interconnection and the Court of Appeals has found that that the Commission has authority to adopt rules of "special concern" for CMRS carriers.[59]

A national uniform access regime for CMRS makes sense. Both CMRS carriers and IXCs operate over multiple states making national rules more appropriate. In addition, requiring CMRS carriers to establish access rates at the state level would lead to a multiplicity of state proceedings which will drive up the cost to both CMRS and IXCs. Finally, a federal forum would lead to reduced transaction costs and less need for regulatory intervention.

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58 H.R. Report No. 103-11, 103rd Cong., 1st Sess. 260 (1993).

59 *Iowa Utils Bd.* at fn. 21.

V. CONCLUSION

The foregoing premises having been duly considered, Salmon respectfully submits that the Commission reaffirm CMRS providers' entitlement to access charges. In addition, Salmon urges the Commission to conclude that bill and keep is inappropriate for CMRS access traffic. Finally, Salmon urges the Commission to provide CMRS carriers with the same rate flexibility in assessing access charges as other non-incumbent local exchange carriers, including the establishment of a federal forum for both intrastate and interstate access charges.

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November 30, 2001

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing AT&T Petition For Declaratory Ruling was served, by hand, the 30th day of November, 2001, on the following

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The undersigned also certifies that a copy of the foregoing AT&T Petition For Declaratory Ruling was served, by Federal Express next business day, the 30th day of November, 2001, on the following:

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